

**NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES  
DIVISION OF HEALTH SERVICE REGULATION  
RALEIGH, NORTH CAROLINA**

**IN RE: REQUEST FOR DECLARATORY )  
RULING BY GOOD HOPE HOSPITAL, INC. )      DECLARATORY RULING**

I, Drexdal Pratt, as Director of the Division of Health Service Regulation, North Carolina Department of Health and Human Services (“Department” or “Agency”), do hereby issue this Declaratory Ruling pursuant to N.C.G.S. § 150B-4 and 10A NCAC 14A .0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

Good Hope Hospital, Inc., (hereinafter “Good Hope”) has requested a declaratory ruling (“Petition”) concerning the applicability of the Certification of Need (“CON”) law and the rules of the Department to certain facts and circumstances described in the Petition. Specifically, Good Hope requests a ruling that (1) it may construct and operate an ambulatory surgical center (ASC) that would reduce the scope and costs of services already approved for development in Good Hope's 2001 Replacement Facility; (2) the time to complete construction under the 2009 Settlement Agreement would be tolled from May 23, 2011, until third party efforts to stop Good Hope from moving forward under said 2009 Settlement Agreement cease; and (3) the execution of agreements, the development of the proposed ASC, and the consummation of the transactions described below do not violate N.C. Gen. Stat. §§ 131E-181(a) and 189(c).

In the alternative, Good Hope requests that the Department approve the requests subject to conditions or find “good cause” to otherwise approve the requests.

For the reasons set out below, I must deny Good Hope’s request.

This ruling will be binding upon the Department and the party requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced

herein. Except as provided by N.C.G.S. § 150B-4, the Department expressly reserves the right to make a prospective change in the interpretation of the statutes and regulations at issue in this Declaratory Ruling. N. Earl Jones, Jr., Chairman, has requested this ruling on behalf of Good Hope and has provided the material facts upon which this ruling is based. In addition, comments have been submitted by Denise M. Gunter of the firm of Nelson, Mullins, Riley & Scarborough on behalf of FirstHealth of the Carolinas, Inc. and Rex Healthcare; Benjamin N. Thompson of the firm of Wyrick Robbins Yates & Ponton LLP on behalf of Harnett Health System, Inc.; Frank S. Kirschbaum of the firm of Nexen Pruet, PLLC on behalf of Surgical Care Affiliates, LLC; and Matthew A. Fisher of the firm of Bode, Call & Stroup, LLP, on behalf of Cumberland County Hospital System, Inc. and WakeMed. I have considered these submissions in making this ruling.

#### **STATEMENT OF THE FACTS**

Good Hope holds a CON dated December 14, 2001 (the “2001 CON”) that was issued pursuant to a 2001 settlement agreement. The CON for Project No. M-6394-01 authorizes Good Hope to construct a replacement hospital that, upon completion, will have no more than 34 acute care beds, including a 5-bed ICU/CCU, 14 psychiatric beds, and three shared operating rooms. The replacement hospital has not been built.

Good Hope initiated various forms of litigation against the Department over the years. In 2009, Good Hope and the Department entered into a settlement agreement (the “Settlement Agreement”) that permits Good Hope to develop a 16-bed inpatient psychiatric facility at the current Good Hope location in Erwin, N.C., and to develop a replacement hospital according to the terms of the 2001 CON (less the psychiatric beds). The replacement hospital must be

licensed, certified and operational within 48 months of the effective date of the 2009 settlement agreement. If not completed within that time frame, Good Hope is to relinquish the 2001 CON.

In May, 2011, FirstHealth of the Carolinas and Rex Hospital (“May Petitioners”) submitted a Request for Declaratory Ruling proposing the following:

The May Petitioners asked that rather than fully develop the Replacement Hospital, Good Hope be approved to develop an ASC with three operating rooms. If approved for the ASC, Good Hope would relinquish all rights to the 34 acute care beds approved in the 2001 CON. The May Petitioners would enter with Good Hope into a “Development Agreement” pursuant to which the May Petitioners would develop the ASC. Under this agreement, the May Petitioners would secure a contractor and provide financing for the ASC, which would be built on the site proposed in the application for the 2001 CON. The May Petitioners stated that the Development Agreement would require Petitioners to develop the ASC in accordance with the representations made in the 2001 CON application about surgical services and with the conditions placed on the 2001 CON. They stated that Good Hope would “explicitly retain ultimate control over the development and construction of the ASC.”

The May Petitioners also stated that Good Hope would enter into a Management Agreement with the Petitioners to manage and operate the ASC upon completion. The May Petitioners would procure an option to purchase the ASC, not exercisable until after it was completed and in operation. (They stated that Good Hope might retain a portion of the ASC.)

I denied that request in a ruling dated 30 June 2011.

In this Petition, Good Hope proposes the same series of transactions as in the May Petition.

## ANALYSIS

### 1. The ASC Request

#### a. The proposed transactions are outside of the scope of the 2001 CON.

The 2001 CON is for a hospital with 34 acute care beds, three shared operating rooms, and a variety of other inpatient hospital functions, including an emergency department, a laboratory, a pharmacy, a physical therapy unit, and various imaging services, including radiology and fluorography, radiography and tomography, nuclear medicine, a CT scanner, ultrasound, and mammography. *See* Exhibits 1 and 2 to Cumberland County Hospital System submission.

A hospital and an ambulatory surgical facility are two different and separately defined health service facilities in the CON law.

A Hospital is defined as:

a public or private institution which is **primarily engaged in providing to inpatients, by or under supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons**, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons. The term includes all facilities licensed pursuant to G.S. 131E-77 of the General Statutes, except long-term care hospitals.

N.C.G.S. § 131E-176(13) (emphasis added)

An Ambulatory Surgical Facility is defined as:

a facility designed for the provision of a specialty ambulatory surgical program or a multispecialty ambulatory surgical program. An ambulatory surgical facility **serves patients who require local, regional or general anesthesia and a period of post-operative observation. An ambulatory surgical facility may only admit patients for a period of less than 24 hours** and must provide at least one designated operating room or gastrointestinal endoscopy room, . . . and at least one designated recovery room, have available the necessary equipment and trained personnel to handle emergencies, provide adequate quality assurance and assessment

by an evaluation and review committee, and maintain adequate medical records for each patient.

N.C.G.S. § 131E-176(1b) (emphasis added)

Therefore, the proposal put forward by Good Hope changes the project from an inpatient hospital to an outpatient ambulatory surgical facility. The 2001 CON was for entirely different health service facility than that proposed by Good Hope.

Because of the change in the nature of the project, Good Hope could not develop an ASC and comply with the representations of the 2001 CON, which are directed toward an inpatient hospital. Moreover, authorizing Good Hope to proceed with an ASC through the mechanism of this declaratory ruling would effectively eliminate the provision of the CON law that new institutional health services require a CON, after review by the CON Section of an application and a determination that the application for a CON is consistent with the criteria specified for a CON. *See* N.C.G.S. § 131E-183.

Good Hope characterizes the transactions as a reduction in scope, rather than a change of scope. However, the change from one new institutional health service to an entirely different service is more than a mere reduction in scope. The prior cases and rulings cited by Good Hope and the May Petitioners in their comments related to this request are factually distinguishable from the proposal here. In any event, rulings are binding only on the parties seeking the ruling and do not necessarily serve as binding precedent for future rulings. *See* N.C.G.S. § 150B-4.

**b. Good Hope has not presented sufficient information to allow the requested ruling.**

Here, as in the May Petition, Good Hope has not provided details of the arrangements that it describes in general terms, and therefore has not shown that the transactions will be within the scope of the 2001 CON. It has provided projected cost information and several letters from

physicians and the mayor of the Town of Erwin expressing support for the project. That, however, does not substitute for full CON review as provided by the CON law. In addition, Good Hope states that it will enter into management and development contracts with the May Petitioners, including an option to purchase or invest in the ASC when it is complete and operational, but Good Hope will remain a “partial owner” if the option is exercised. Good Hope states that it will retain “ultimate control” of development of the ASC, but the outline of the transactions leaves open whether Good Hope’s “ultimate control” has any substance, and whether the proposal is effectively a transfer of a CON in violation of N.C.G.S. §§ 181(a) and 189(c). Since the May Petitioners and Good Hope apparently have not executed any binding documents, or even agreed on the details of the documents, they cannot provide sufficient information to support the ruling they request.

## **2. Tolling of the Settlement Agreement**

The 2009 Settlement Agreement contains the following provision:

Litigation Stay. If any third party brings any **administrative, legal or equitable action or proceeding that seeks to delay, obstruct, enjoin, or otherwise frustrate the development or operation of the Mental Health Facility or the 2001 Replacement Facility**, including an action challenging the terms of this Agreement, the 48 month time period for development of the Mental Health Facility and 2001 Replacement Facility shall be stayed for the duration of the action or proceeding (but not to exceed three years from the date the action or proceeding is initiated). The 48 month time period will re-commence beginning on the earlier of: (1) the date the action or proceeding has been fully adjudicated, or (ii) three years from the date the action was filed.

(emphasis added)

Good Hope asks for a declaratory ruling confirming its contention that a litigation stay went into effect on May 23, 2011 when Harnett Health System, Inc. filed a comment opposing the May Petition, and apparently will continue until opposition to Good Hope’s requests ends. It

asserts that the purpose of this filing was “in order to obstruct or otherwise frustrate Good Hope’s plan to develop services that have been approved under the 2009 Settlement Agreement.”

A person aggrieved may request an agency to issue a declaratory ruling “as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency.” N.C.G.S. 150B-4(a). On request an agency also may issue a ruling “to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency.” *Id.* Good Hope’s request for a ruling does not ask for an interpretation of a law or rule; it asks for an interpretation of a contractual clause in a settlement agreement. Therefore, I must decline to issue the ruling requested by Good Hope related to the litigation stay provision of the Settlement Agreement.

Alternatively, Good Hope’s position fails on its face because the litigation stay provision clearly does not apply to this situation. A declaratory ruling request is not litigation, nor is it an administrative, legal or equitable proceeding. For that matter, neither Harnett Health System nor Good Hope were parties seeking the declaratory ruling in the May Petition. Each simply proffered comments. Finally, Harnett Health System opposed the ruling requested by the May Petitioners seeking to convert the CON for an inpatient hospital to an ASC. It did not oppose development of the 2001 Replacement Facility.

### **3. The Good Cause Request**

Good Hope alternatively requests that the Department find “good cause” for a transfer of the 2001 CON, presumably from Good Hope to the May Petitioners or to some entity created by them, pursuant to N.C.G.S. § 131E-189(c). However, it has made no showing of good cause, merely asserting a generalized need for an ASC. In any event, since the 2001 CON does not authorize an ASC, a transfer would not accomplish Petitioners’ ends.

## **CONCLUSION**

For the foregoing reasons, I conclude that Good Hope's request for a declaratory ruling should be, and therefore is, denied.

This the \_\_\_\_\_ day of February, 2012.

---

Drexdal Pratt, Director  
Division of Health Service Regulation  
N.C. Department of Health and Human Services



**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Declaratory Ruling has been served upon the nonagency party by certified mail, return receipt requested, by depositing the copy in an official depository of the United States Postal Service in first-class, postage pre-paid envelope addressed as follows:

**CERTIFIED MAIL**

N. Earl Jones, Jr.  
Chairman, Good Hope Hospital, Inc.  
302 Cottle Lake Drive  
Coats, NC 27521

With Courtesy Copies to:

Benjamin N. Thompson  
Wyrick Robbins Yates & Ponton LLP  
P.O. Drawer 17803  
Raleigh, NC 27619

Denise M. Gunter  
Nelson Mullins Riley & Scarborough L.L.P  
380 Knollwood Street, Suite 530  
Winston-Salem, NC 27103

Frank S. Kirschbaum  
Kirschbaum, Nanney, Keenan  
& Griffin, P.A  
P.O. Box 19766  
Raleigh, NC 27619-9766

Matthew A. Fisher  
Bode, Call & Stroup, LLP  
P.O. Box 6338  
Raleigh, NC 27628-6338

This the \_\_\_\_\_ day of February, 2012.

---

Jeff Horton  
Chief Operating Officer